United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2056

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
PHYLIS SKLOOT BAMBERGER

B P/S

Docket No. 74-2056

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

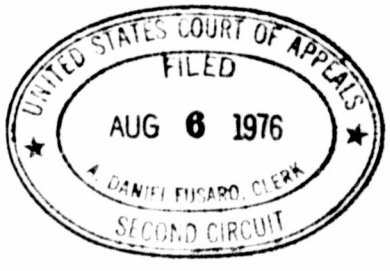
-v.-

RICHARD PATRICK CARRIGAN,

Defendants-Appellants.

BRIEF FOR APPELLANT
RICHARD PATRICK CARRIGAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



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FOR THE NORTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the sentence was imposed in violation of due process when the Judge relied on materially incorrect assumptions about appellant's prior criminal record.

2. Whether the representation of both appellant and his co-defendant by one trial attorney deprived appellant of competent representation requiring a new trial.

3. Whether a hearing is required to determine whether Government witnesses falsely testified that no promises were made to them in return for their cooperation.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Northern District of New York (The Honorable Lloyd F. MacMahon sitting by designation) rendered on July 19, 1974, convicting appellant of aiding and abetting the interstate transportation of stolen goods and sentencing him to eight years in prison.

The Legal Aid Society, Federal Defender Services Unit, was assigned pursuant to the Criminal Justice Act as counsel on appeal after two successive prior assigned counsel were relieved for failure to perfect the appeal.

Appellant is presently incarcerated and serving his sentence after bail pending appeal was revoked when counsel failed to perfect the appeal.

STATEMENT OF FACTS

The appellant Carrigan and Robert Edward White were indicated for interstate transportation of stolen leather goods knowing the same to have been stolen. The events were alleged to have occurred on March 7-8, 1974.* Both appellant and White were represented by the same trial attorney, Armand R. Riccio.**

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*The indictment is annexed as B to appellant's separate appendix.

**Although the record on appeal, Doc. No.22, 23 show Mr. Riccio to have been assigned, appellant asserts in an affidavit before this Court that Mr. Riccio was retained.

The Government's Case

The three key Government witnesses, Joel Greenberg, Richard Paul Ragone and Gene Arthur Southwick were all involved in the commission of the crime charged in the indictment. The testimony of the witnesses was that late in February, 1974, Ragone and another man visited appellant's apartment to borrow some money (98-100).* Co-defendant White was in the apartment and asked Ragone if he could get a truck so they could pull a job. A few days later, before March 7, 1974, Ragone met with appellant and White. Ragone told White he had $29 for a truck, and asked for an additional sum. They supplied another $20 (101) and Ragone got the truck on March 7.

Ragone enlisted the aid of Southwick in the plan by telling him White had said they could make a lot of money (102, 146-8).

Southwick, Ragone, appellant and White met on March 7. Southwick and Ragone were instructed to load as much leather as possible into the truck from the warehouse to which they were going (103). White and appellant led Ragone and Southwick to the M. Frenville Company warehouse at Gloversville, New York (87, 151-2). There, Ragone and Southwick, unable to get the roll door of the building fully open, loaded the truck with some difficulty (107).

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*Numerals in parenthesis refer to pages of the trial transcript.

After the truck was loaded, it was driven by Ragone and Southwick into Massachusetts (112).

In the meantime, White and appellant met Joel Greenberg (3) pursuant to earlier arrangements.* It was decided that the three would meet the next morning at 11:00 a.m. at a motel in Haverhill, Massachusetts (31).

At 10:30 a.m. Greenberg went to see Theodore Zikos, a long-time leather jobber who had known the Greenberg family (32). Greenberg asked Zikos to buy the leather which appellant and White had. Zikos agreed to look at it and buy it if he liked it (32-3).

At the appointed hour, appellant and White arrived with the truck (33). With Greenberg, they discussed the price of the leather and then drove to Zikos' warehouse (67-68). White and Greenberg unloaded the goods (35, 69).

While they were unloading, appellant came in to the warehouse to say that he had to return to Albany immediately because his wife had been "picked up by a policeman" (36).

Greenberg agreed to meet White and appellant at Howard Johnson's as soon as he got the money for the goods. Zikos

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*According to Greenberg, he had been contacted in January, 1974 by a man who, although unknown to Greenberg, apparently had been an acquaintance of Greenberg's father. Greenberg's father, who had been in the leather business, had recently died and the man asked Greenberg to dispose of some leather as though it were part of his father's estate (21). When Greenberg showed reluctance, the man demonstrated he was wearing a gun and stated that Greenberg would be contacted by a man named Dick. Two weeks later "Dick" called Greenberg. Greenberg, White and appellant met and "Dick" told Greenberg he would be bringing the leather soon (24-25).

gave Greenberg two checks totalling $5,000 with a promise of additional payment in ten days (36-37, 71-72). After some delay, the checks were cashed and Greenberg drove White and appellant to Logan Airport where they were to take a flight to Albany (38).

Later that night, Ragone and Southwick met at appellant's apartment in Albany where they were given $500 each.

On March 9, the goods were identified as coming from Frenville Company (90).

The Defense

Appellant testified that Ragone met him and White and asked if they knew of anyone who wanted to buy leather goods (192). At that time appellant did not know of anyone but later appellant met George Woods and asked Woods about it. Woods referred appellant to Joel Greenberg as a person interested in buying leather goods.

Later when appellant and White were in Boston, they called Greenberg and set up a meeting. They met Greenberg and he expressed interest in buying leather (194).

Subsequently, when Ragone came to appellant's apartment to borrow some money appellant told Ragone about Greenberg, and Ragone said he would get in touch with appellant (194).

About March 4, Ragone called appellant and asked to meet with appellant and White. At the meeting Ragone said he had

found someone who could get some leather for sale. Ragone borrowed $20 from White to rent a truck.

Appellant contacted Greenberg. Greenberg told appellant to have the goods brought to a motel the next day and appellant advised Ragone of those instructions (197).

Ragone and Southwick went to pick up the leather goods and later appellant and White met them at a diner (200). The next morning, all four met Greenberg at the designated place (202) and Greenberg took them to the warehouse (202). White and Greenberg unloaded the truck while Ragone and Southwick stood around. Appellant called home and, learning his wife had been assaulted, returned to Albany with White by plane. Appellant asked Ragone and Southwick to drive the car and the truck back to Albany. They were all to meet at appellant's apartment (208).

Greenberg drove appellant and White to the bank and Greenberg got $5,000 which he gave to appellant. Greenberg drove appellant and White to the airport (209).

Of the money, appellant gave Ragone and Southwick $1,000 and kept $4,000 for White and himself (211).

The Witnesses

During the testimony of Ragone, it was disclosed to the jury that he had pleaded guilty to interstate transportation of the stolen goods on May 6, 1974, about one month prior to

appellant's trial (97) and at the time of the trial was awaiting sentence. The same was disclosed about Southwick (145).

On cross-examination Ragone was asked if any promise had been made to him by the prosecutor with respect to his testimony. To this Ragone replied "No" (124).

Southwick stated he was awaiting sentence and did not know what would happen to him (159). He testified he was told that his testimony wouldn't help his sentence one way or the other (160).

Southwick also testified that at the time of his arrest by New York State troopers on March 21, 1974, he was kicked and punched by the troopers for about 20 minutes. Appellant and White were named by the troopers involved in the beating. The troopers said if appellant and White were named the troopers would "take care" of Ragone and Southwick. Southwick then gave a statement incriminating appellant. Southwick testified that charges against him in the state courts were dropped (178).

On July 16, 1974, Ragone and Southwick were sentenced by Judge Foley. The prosecutor stated he had no recommendation (Minutes of Sentence at 3)(N.D.N.Y., 74 Cr. 62, July 16, 1974), but the record reveals that the prosecutor did speak with Judge Foley or the probation department about the cooperation of Southwick and Ragone:

> THE COURT: I have gone over your presentence reports and I will treat you both alike. I discussed it with the Probation Officer.
>
> I first want to say, and Mr. French has said it, that you cooperated and did

> cooperate at the trial of the two other defendants, tried in Auburn, and that has been given consideration, that cooperation. I also understand that there is something that will be done in the State Court concerning the charges pending there.
>
> MR. FRENCH: This is true. I have spoken with the local district attorney and after the two defendants came in here and pled he said that they would defer to the federal prosecution and at that time had no intention of proceeding on the breaking and entering in the place where the leather was stored. He preferred that they be prosecuted on the interstate commerce offense of the stolen leather and I believe he has no intention of proceeding any further with their involvement.
>
> (Sentencing Minutes, July 16, 1974, page 6-7)

Judge Foley then imposed upon Ragone and Southwick split terms under 18 U.S.C. §3651, with a resulting period of only six months in custody.

No charges were brought against Zikos or Greenberg.

Joint Representation by Defense Counsel

As part of its case in chief, the Government introduced into evidence a statement given by White at the time of his arrest to FBI agents in which White said he had nothing to do with the burglary or the transfer of goods. He stated that he was in Schenectady and Albany during the relevant period and that a portion of the time was spent with appellant in Albany.

As indicated supra at 5-6, appellant's testimony was to the contrary for he acknowledged making arrangements for the transfer of leather goods, but denied knowledge of the origin of the goods.

In summation, counsel made no reference to testimony about White's statement and did not repudiate it as inconsistent with the appellant's testimony.

Sentencing and Post Sentencing Motions

On July 19, 1974, three days after Ragone and Southwick were sentenced to a term of six months imprisonment and two-and-one-half years of probation, appellant was sentenced to eight years in prison.

At the sentencing procedure the Assistant United States Attorney represented that a warrant was outstanding for appellant's arrest for illegal use of a credit card. Both appellant and Mr. Riccio disclaimed any knowledge about use of a credit card. Defense counsel then stated, "I am quite confident has before it an excellent report" (Minutes of Sentence at 3). The Court stated:

> This was a very serious crime. And you have a long criminal record. The Court sees no reason whatever to be lenient. The Court sentences you to eight years on Count 1.
>
> (Minutes of Sentence at 4)

On July 18, 1975, appellant wrote to Judge MacMahon stating that he had for the first time seen a copy of his FBI report

and found that the report was inaccurate and incomplete. He stated that of seven charges listed in the report, four were dismissed, two resulted in acquittals and one was for a crime for which he was not arrested. Appellant asked to see the pre-sentence report to determine if there were any other errors which might have influenced the Court to impose the eight year sentence (Record on Appeal Doc. No. 40).* In an order dated July 31, 1975, Judge MacMahon denied the motion except to forward to appellant a copy of his FBI record which he already possessed.**

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*The letter is annexed as D to appellant's appendix.

**Judge MacMahon has denied a motion by the Federal Defender Services Unit appellate counsel to see the pre-sentence report. The Judge found 'no good reason to turn it over a year' after sentence was imposed and stated the report had been disclosed to appellant and his counsel at the time of sentencing.

The report of White has been given to White's appellate counsel.

ARGUMENT

POINT I

THE EIGHT YEAR TERM OF IMPRISONMENT IMPOSED IN RELIANCE ON MATERIAL MISCONCEPTIONS ABOUT APPELLANT'S PRIOR RECORD VIOLATES DUE PROCESS AND MUST BE VACATED.

At the time of the imposition of sentence, Judge MacMahon specifically referred to appellant's prior criminal record as one of the two factors which produced the very substantial eight year sentence.* The Court's conclusions about appellant's criminal record was necessarily based upon information supplied by the FBI. However, in a letter written a year later, appellant advised the Court that he had seen, for the first time, a copy of the FBI criminal record report, and that the report was misleading and inaccurate. Appellant stated that while seven of the eight charges in the report showed no disposition; in fact, of those seven charges, four were dismissed, two resulted in acquittals and one was a charge for which appellant had never been arrested. Appellant then asked to see his pre-sentence report so that he might correct possible other errors in it.

The prior arrest record, already in appellant's possession, was the only portion of the pre-sentence report that Judge MacMahon permitted to be sent to him. Indeed, the arrest record

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*The other factor was the seriousness of the crime. However, it is significant to note that the crime involved no weapons, no violence, and no injury to others.

reflected that five charges remained pending at the time of sentence,* and it did show that one had been dropped and one had resulted in an acquittal. The record thus shows that the Court relied upon materially false assumptions with respect to facts relevant to the sentencing. All but one of the charges, even as reflected in the report before the Judge were favorably disposed of or unresolved. Appellant's information showed five additional favorable dispositions. The Court erroneously believed that appellant had a substantial criminal record when in fact that was not the case. For this reason, the sentencing procedure was invalid as a violation of due process, United States v. Tucker, 404 U.S. 443 (1971); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Needles, 472 F.2d 652 (2d Cir. 1973); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970), and the sentence must be vacated and a new sentence proceeding held.

The record indicates that neither counsel nor the appellant saw the pre-sentence report prior to sentence. Counsel stated at sentence that he "was quite confident that the Court had before it an excellent report." The clear import of this language is that he had not seen the report, but was replying on an assumption about what the report contained. The appellant's letter to the Court, written a year after the

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*These charges were assault in the second degree, resisting arrest, driving while intoxicated, possession of marijuana, and grand larceny in the third degree.

sentence, stated he had not seen the criminal record sheet until just prior to writing the letter. He asked for a copy of the whole pre-sentence report so that he might correct errors he found. This request clearly implies that he, too, had not seen the report. Counsel's failure to examine the report prior to sentence and to bring the Court's attention to errors or omissions in the report was a violation of the responsibility he owed his client at the sentencing procedure.* In Townsend v. Burke, supra, 334 U.S. at 740, where the defendant had no counsel to advise the sentencing judge that the pre-sentence report contained errors about the prior criminal record, the Supreme Court stated:

> Counsel,...would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted.

Cf. Mempha v. Rhay, 389 U.S. 128, 133 (1967); United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied without prejudice, 417 U.S. 950 (1974). See generally A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Defense Function, §8.1 at 285 (Approved Draft 1971). Here, counsel failed in his responsibility producing, as in Townsend, a sentence premised on material misinformation.

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*Even if trial counsel did see the pre-sentence report as Judge MacMahon stated, contrary to the record in this case, in his August 2, 1976 order (denying permission for appellate counsel to see the report) counsel failed in his duties for he did not obtain the correct information and present it to the Judge.

The recognized disastrous effect of erroneous material in the pre-sentence report (United States v. Rosner, supra, 485 F.2d at 1230-31; United States v. Malcolm, supra; H.R. Rep. No. 94-247, 94th Cong., 1st Sess. (1974)) was experienced by the appellant who was sentenced to eight years in custody because of the erroneous belief concerning his criminal record.

POINT II

THE REPRESENTATION OF APPELLANT AND CO-DEFENDANT WHITE BY ONE ATTORNEY PRODUCED A CONFLICT OF INTERESTS VIOLATING APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Armand Riccio, Esq. was assigned in June, 1974 by the district court to represent both appellant and the co-defendant White. The record reveals no inquiry by the district court at any time to determine whether a conflict of interests existed, and whether the appellant and White understood the potential of a conflict, the dangers of such a situation and the right to have separate counsel, and whether both consented to the joint representation. This Court has required such an inquiry whether counsel is assigned (Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968)), or retained (United States v. De Berry, 487 F.2d 448, 453 (2d Cir. 1973)).* United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975); United States v. Alberti, 470 F.2d 878, 881 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973).**

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*In an affidavit before this Court in support of a motion for bail, appellant has stated that he retained Mr. Riccio. No further information is before this Court except that the record does not include a CJA form 20 with a request for payment. However, whether counsel was retained or assigned, the dangers are identical and the distinction is of no significance. See United States v. DeBerry, supra, 487 F.2d at 454.

**The District of Columbia Circuit precludes joint representation by any assigned counsel. Ford v. United States, 379 F.2d 123, 126 (1967). See United States v. Mari, supra, 526 F.2d at 119-120 (concurring opinion, Oakes, J.).

Since no such inquiry was conducted here, reversal of the judgment is required (see United States v. Mari, supra, and United States v. Vowteras, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974), where inquires were conducted, but because no specific instance of prejudice occurred the convictions were affirmed). At a minimum, reversal is required unless the Government can establish that appellant was not prejudiced by the joint representation. United States v. DeBerry, supra, 487 F.2d at 453-4 n.6; United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972).

On this record, the Government cannot make such a showing. Appellant chose to take the stand to testify and White did not do so. Mr. Riccio was thus unable to argue affirmatively to the jury that appellant's credibility was enhanced by his decision to testify and face cross-examination by the prosecutor. By doing so, he would have made it appear to the jury that White was hiding something. See Morgan v. United States, supra, 396 F.2d at 114.

Further, White's defense and appellant's defense were inconsistent. Although White chose not to take the stand,* a statement given by him to FBI agents at the time of his arrest was introduced at trial as part of the Government's direct case.

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In the statement White denied any participation in the crime and stated he was in Albany and the surrounding area during the time the crime was alleged to have occurred. Appellant, on the other hand, testified that he and White were involved in the arrangements for the transfer of the leather, but did not know of its origin or theft. Becuase he represented both appellant and White, counsel could not attempt to explain away the inconsistencies by repudiation of White's statement to the agent. While he did speak of appellant's defense in summation, he did not specifically assert that White's statement was untruthful and therefore that it was appropriate to give credence to the appellant's version of the events. This failure to specifically repudiate the inconsistent defense deprived appellant of the effective presentation of his case to the jury in summation, a basic part of the adversary factfinding process. Herring v. New York, 95 Sup. Ct. 2550, 2553 (1975). Appellant was thus deprived of the undivided assistance of competent counsel required by the Sixth Amendment. United States v. DeBerry, supra, 487 F.2d at 454.

POINT III

A HEARING IS REQUIRED TO DETERMINE WHETHER THE PROSECUTOR MADE AN UNDISCLOSED PROMISE TO TWO CRUCIAL GOVERNMENT WITNESSES.

Richard Ragone and Gene Southwick were arrested (121) and charged in an information (74 Cr. 62) with interstate transportation of stolen goods for their participation in the crime charged in the indictment in this case.

Both Southwick and Ragone pleaded guilty prior to appellant's trial and then testified against appellant.

During the cross-examination of Ragone by defense counsel, Ragaone was asked:

> Has any promise been made to you be the United States Attorney with respect to your testimony here?
>
> (124)

Ragone said, "No" (124).

Southwick was asked if he was interested in avoiding a jail term and responded that he didn't know what would happen. Counsel then inquired:

> Do you feel, sir, that by testifying as you have today, that this might be taken into consideration in passing sentence on you?
>
> (159)

Southwick's response was:

> I was told it wouldn't help me in any way if I did or didn't.
>
> (160)

On July 16, 1974, after appellant was found guilty, Ragone and Southwick were sentenced. Counsel for Ragone stated that the Court was already aware that Ragone had been a witness against a defendant in another case (Transcript of July 16, 1974 at 4 (N.D.N.Y. 74 Cr. 62)).

Judge Foley, the sentencing Judge, confirmed that the Assistant United States Attorney had informed him of the cooperation of Ragone and Southwick and that he was considering that cooperation in deciding the sentence to impose (Id. at 6).

Finally, the Assistant United States Attorney, the same one who prosecuted appellant, acknowledged that he had spoken to the state district attorney about state charges against Ragone and Southwick. He believed that the pending charges would not be prosecuted.*

Judge Foley then imposed upon Ragone and Southwick three year terms of imprisonment, two and one half years of which was to be suspended.

The minutes of the sentencing clearly show that the federal prosecutor, although stating in Court that he had no sentence recommendation, acted on behalf of Ragone and Southsick by bringing their cooperation to the attention of Judge Foley and by assisting them in the disposition of the state charges pending against them.

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*Southwick's testimony at trial that the charges had already been dropped may have been premature.

This raises substantial questions as to whether Ragone told the truth when he testified that the prosecutor made no promise with respect to the testimony,* and whether Southwick was being candid when he declined to answer whether he thought the cooperation would be taken into consideration and stated that he was affirmatively told it would have no effect.

The prosecutor's conduct on behalf of Ragone and Southwick result from either the prosecutor's magnanimous nature, or from some understanding between him and Ragone and Southwick. The latter interpretation is the more likely in the light of usual practice. If this is so, the answers by Ragone and Southwick were false and the prosecutor made no attempt to correct them.

If the prosecutor made any kind of promise to Ragone and Southwick he was under an obligation to reveal that promise when counsel inquired concerning it. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959). See United States v. Badalamente, 507 F.2d 12, 17-18 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975); United States v. Sperling, 506 F.2d 1323, 1332-3 (2d Cir. 1975), cert. denied, 402 U.S. 962, 949 (1975); United States v. Pacelli, 491 F.2d 1108, 1112 (2d Cir. 1974).

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*At the time he entered his plea on May 6, 1974, Ragone said no one had made any promise to him with respect to his sentence. (Minutes of April 10, 1974 and May 6, 1974 at 16 (N.D.N.Y. 74 Cr. 62)). This answer could be truthful and not inconsistent with an affirmative answer to the question counsel asked at trial. The usual promise relates to advising the Court about the cooperative testimony and not to the length of sentence.

If there was a promise made, the jury was entitled to know about it in order to evaluate the credibility of Ragone and Southwick. Giglio v. United States, supra. They were key witnesses to the Government especially to contradict the appellant's theory of the defense - lack of knowledge.

Since the record reflects the likelihood of a concealed promise, the case should be remanded for a hearing on this question.

CONCLUSION

FOR THE ABOVE-STATED REASONS THE JUDGMENT BELOW SHOULD BE VACATED AND A NEW TRIAL GRANTED. ALTERNATIVELY, THE JUDGMENT SHOULD BE VACATED AND A HEARING GRANTED. ALTERNATIVELY, THE SENTENCE SHOULD BE VACATED AND A NEW SENTENCING PROCEEDING ORDERED.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

AUGUST 6, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the NORTHERN District of New York.

David L. Gottlieb